

# IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO 98 of 2010

FRED TUNGU MPENDAZOE.....

APPLICANT

VS

THE ATTORNEY GENERAL

1<sup>ST</sup> RESPONDENT

DR. MILTON MAKONGORO MAHANGA

2<sup>ND</sup> RESPONDENT

THE RETURNING OFFICER, SEGEREA CONSTITUENCY

3<sup>RD</sup> RESPONDENT

## RULING

Date of last Order: 08-02-2011

Date of Judgment: 15-02-2011

**JUMA, J.:**

Earlier, in his application which was filed on 17<sup>th</sup> December 2010 with respect to Miscellaneous Civil Cause Number 98 of 2010 (an Election Petition for the Avoidance of Election Results), the Applicant/Petitioner (Fred Tungu Mpendazoe) moved this Court,

- i) to order that Applicant/Petitioner be exempted from the payment of any form of security for costs;
- ii) to determine the amount to be deposited by the Applicant/Petitioner as security for costs.

The Attorney General (1<sup>st</sup> Respondent), Dr. Milton Makongoro Mahanga (2<sup>nd</sup> Respondent) and the Returning Officer, Segerea

Constituency (3<sup>rd</sup> Respondent) all opposed the Applicant/Petitioner's application to be exempted from obligations to pay into this Court the security for costs.

Together with his counter affidavit, the 2<sup>nd</sup> Respondent (Dr. Milton Makongoro Mahanga) filed a Notice of Preliminary Objection on Point of Law dated 10<sup>th</sup> January 2011. The objection contends that the affidavit executed by Applicant/Petitioner in support of his application is incurably defective since it was executed in contravention of the law i.e. its jurat of attestation does not state where the oath was administered or taken. When the point of objection came up for arguments on 8<sup>th</sup> February 2011 Mr. Jerome Joseph Msemwa, learned Advocate argued the objection on behalf of the 2<sup>nd</sup> Respondent. Mr. Obadiah Kameya the learned Principal State Attorney appeared on behalf of both the **Attorney General** (1<sup>st</sup> Respondent) and the **Returning Officer, Segerea Constituency** (3<sup>rd</sup> Respondent).

On the point of objection, Mr. Msemwa submitted that the affidavit of the Applicant is incurably defective because it has not complied with section 8 of the **Notaries Public and Commissioners for Oaths Act Cap 12 R. E. 2002**. Section 8 requires every notary public and commissioner for oaths before whom any oath or affidavit is taken or made to state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made.

Mr. Msemwa cemented his submission by referring to me the case of **Oryx Oil Co. Ltd vs. MC Juro Shipping Agency Ltd, Commercial Case No. 263 of 2002 DSM** where Kimaro, J. (as she then was) ruled that the omission to state where the affidavit was administered is fatal. Mr. Msemwa also drew my attention to another decision of this Court in **Wananchi Marine Products (T) Ltd vs. Owners of Motor Vessels DSM Civil Case No. 123 of 1996** where Kalegeya, J. (as he then was) stated that a jurat of attestation which does not state the place where the affidavit was sworn is incurably defective.

Mr. Msemwa submitted that the versions of affidavit of the Applicant/Petitioner that were served on the respondents do not show in their jurat of attestation at what place the affidavit of Applicant/Petitioner was taken. Mr. Msemwa decried what he regarded as a disturbing tendency of some Advocates who, upon learning of points of objection against their pleadings, collude with court officials to tamper with court records to defeat the purpose of preliminary points of objection. The learned Advocate hoped that the court files have not been surreptitiously altered by hand-written additions on the affidavit of the Applicant/Petitioner to indicate where it was sworn. And any such hand-written addition or insertion if any, should be expunged from the records of the application.

Mr. Msemwa's submission was wholly supported by Mr. Kameya the learned Principal State Attorney. Mr. Kameya submitted that the affidavit of Fred Tungu Mpendazoe is incurably defective because its jurat of attestation does not show at what place the

affidavit was taken as required by section 8 of the **Notaries Public and Commissioners for Oaths Act**. The learned Principal State Attorney is also of the view that as long as the affidavit of the applicant is defective, the application by the applicant for exemption from payment of security for costs is also rendered incompetent as if it was not filed at all in the first place. That with an incompetent affidavit, the application to be exempted from payment of security for cost is left without any leg to stand on.

On the authority of the Court of Appeal decision in **Ghati Methusela vs Matiko w/o Marwa Mariba MZA Civil Application No. 6 of 2006**, Mr. Kameya urged me to strike out the Applicant/Petitioner's application for exemption from payment of security for costs. In the cited case of **Ghati Methusela (supra)**, Rutakangwa, J.A. at page 2 stated that,

"It is now established law that an incompetent proceeding, be it an appeal, application, etc, is incapable of adjournment, for the court cannot adjourn or allow withdrawing what is incompetently before it:"

Submitting for the Applicant/Petitioner, Mr. Peter Kibatala strenuously opposed the preliminary objection on point of law. The learned Advocate reiterated that the Applicant/Petitioner's affidavit supporting an application for exemption from payment of security for costs is not defective or incompetent as alleged by the respondents. According to Mr. Kibatala the affidavit taken out by the Applicant/Petitioner properly and legally states the place where it was taken. Mr. Kibatala advised this Court to be guided

by what is reflected in the court file which shows that the place where affidavit was taken is clearly indicated. Further, Mr. Kibatala added that inasmuch as the learned counsels for the respondents have not shown when they perused the court records and what they found following any such perusal, the learned Counsel for respondents are not justified to cast aspersions on accuracy of the court records.

Mr. Kibatala referred to me to the decision of the Court of Appeal (**Ramadhani, Lubuva and Samatta, JJ.A.**) in **Halfani Sudi v. Abieza Chichili [1998] TLR 526, 529** where Ramadhani, J.A. underscored that court records should not be impeached lightly,

"We entirely agree with our learned brother, MNZAVAS, J.A. and the authorities he relied on which are loud and clear that 'A court record is a serious document. It should not be lightly impeached:'.... and that 'There is always the presumption that a court record accurately represents what happened.... In this matter, we are of the opinion that the evidence placed before us has not rebutted this presumption.'"

Apart from maintaining his stand that the affidavit taken out by the Applicant/Petitioner has not contravened section 8 of the **Notaries Public and Commissioners for Oaths Act**, Mr. Kibatala has submitted that due to peculiarity of election petitions the mandatory language of section 8 regarding affidavits does not extend to cover matters arising from **National Elections Act, Cap. 343** and **National Elections (Election Petitions) Rules, GN 447 of 2010**. According to Mr. Kibatala election petitions are peculiar kind

of civil litigation where strict requirements of affidavits do not apply.

I have given due consideration to the rival arguments and the authority cited by the learned counsel. I propose to begin by asking whether the preliminary point of objection falls within the guiding principles furnished in the landmark case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696**.

That is, the preliminary point of objection consists of a pure point of law which if argued as a preliminary objection is capable of disposing of the Applicant/Petitioner's application for exemption from paying security for costs without going into the merit of the application. The point objection raised by the 2<sup>nd</sup> respondent contends that the supporting affidavit of the Applicant/Petitioner should be struck out because its jurat of attestation does not state where the oath was administered or taken. In light of Court of Appeal decisions which have expounded section 8 of **Notaries Public and Commissioners for Oaths Act**, I am satisfied that the point of objection by the 2<sup>nd</sup> respondent raises a pure question of law capable of disposing off the Applicant/Petitioner's application to be exempted from payment of security for costs.

Let me begin with the restatement of law articulated by the Court of Appeal in the case of **Halfani Sudi v. Abieza Chichili (supra)** on the rebuttable presumption that a court record accurately represents what actually happened in the court concerned. The Court of Appeal was obviously underscoring the need for the

court records to accurately represent all that which takes place at the trial or appeal, and it is of great importance that nothing should be omitted which ought to be upon the record. I can extend the Court of Appeal's presumption to imply also that pleadings that are filed by a party are supposed to be the same and similar as those whose copies are served on parties scheduled to appear as defendants or respondents as the case may be. There should be no difference between affidavits filed in court and the affidavit sent out to the respondents.

Mr. Msemwa and Mr. Kameya contended and indeed showed me that copies of affidavits of the applicant/petitioner which were served on respondents do not in their jurat of attestation show the place where the affidavit was taken. I have perused the affidavit forming part of the records of this court, and I noted that the Applicant/Petitioner swore the contested affidavit on 16<sup>th</sup> December 2010 before Francis A.M. Mgare (Commissioner for Oaths). The type-written text of the jurat in the records of this Court does not show the place where the Applicant/Petitioner was sworn. But there is a hand-written insertion of the word "DSM" to suggest that the place where that affidavit was sworn in Dar es Salaam. Upon my perusal of the affidavits which were served on the respondents, it dawned on me that the jurat of attestation of the affidavit of the Applicant/Petitioner which were served on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents do not show the place where the affidavit was sworn. In fact they do not have the insertion "DSM" to

show that the affidavit of Applicant/Petitioner was sworn in Dar es Salaam.

It is clear that copies affidavits which were served on the three respondents do not have hand-written insertions "DSM." It is clear to me that the word "DSM" was belatedly inserted in the affidavit filed in this Court's records of the petition. This Court takes great exception to this attempt to tamper with integrity of court records. The affidavit of the Applicant/Petitioner which was served on the respondents shall reflect the correct record of affidavit which the Applicant/Petitioner filed in this Court in support of his application. I hereby find and hold that the affidavit of Applicant/Petitioner offended section 8 of **Notaries Public and Commissioners for Oaths Act** and is as a result incurably defective. With defective affidavit the application for exemption from payment of security for costs has no leg to stand on and is expunged from the records of this Court.

Next question for my determination is the effect of an application founded on affidavit that is incurably defective. Mr. Kibatala is suggesting that the mandatory requirements under section 8 of the **Notaries Public and Commissioners for Oaths Act** do not extended to cover matters arising from the **National Elections Act, Cap. 343** and **National Elections (Election Petitions) Rules, GN 447 of 2010** which according to the learned counsel are a peculiar type of litigation not governed by the strict requirements of affidavits. Mr. Kameya the learned Principal State Attorney did not



agree with this proposition of law. According to Mr. Kameya, an affidavit is evidence on oath/ affirmation and cannot be amended. A defective affidavit can only be replaced by a new affidavit. Mr. Kameya is in no doubt affidavit, be it for an election petition, or in support of an application for exemption from payment of security for costs or for any other litigation is evidence on oath. As evidence on oath affidavits must comply with section 8 of the **Notaries Public and Commissioners for Oaths Act Cap 12 R. E. 2002.**

With respect, the learned Principal State Attorney is correct. The law governing affidavits does not draw distinction between affidavits for general civil litigation and affidavits in pursuance of election petitions. Mandatory provisions of section 8 of the **Notaries Public and Commissioners for Oaths Act** regulate ordinary civil litigation just as it regulates matters arising from the **National Elections Act, Cap. 343** and **National Elections (Election Petitions) Rules, GN 447 of 2010.** The law as expressly provided by Rule 22 of the **National Elections (Election Petitions) Rules** is clear, that all applications made to this Court under the **National Elections Act** and **National Elections (Election Petitions) Rules**, are to be made by chamber summons supported by affidavit. Rule 22 of the **National Elections (Election Petitions) Rules** provides the vital fall back clause to the **Civil Procedure Code, Cap. 33** to fill any gaps of procedure found in the **National Elections Act**,

22.-(1) Subject to the provisions of the Act and of these Rules, the hearing, practice and procedure in respect of a petition shall be regulated, by the

rules regulating the practice and procedure in a civil suit.

(2) Without prejudice to the generality of the provisions of sub-rule (1) of this rule, the provisions of section 80 and of the First Schedule to the Civil Procedure Code, which relate to the discovery and inspection of documents, admissions, production, impounding and returning of documents, transfer of proceedings, settlement of issues and determination of suits, summoning of witnesses, admissibility of affidavits, awarding of costs, judgments and execution of a decree, shall apply mutatis mutandis to the proceedings on a trial of a petition and to enforcement of an order for costs made by the court.

From the foregoing Rule 22, it is clear to me that applications made to this Court in pursuance of provisions under **National Elections Act** and **National Elections (Election Petitions) Rules** are to be guided by ORDER XLIII Rule 2 of the **Civil Procedure Code**, requiring any such an application to be instituted by a Chamber Summons supported by an affidavit. The law governing affidavits that are employed under the **National Elections Act** and **National Elections (Election Petitions) Rules** is none other than the **Notaries Public and Commissioners for Oaths Act Cap 12 R. E. 2002** with which the Applicant/Petitioner has not complied with.

The fate of the petition is another important question which this Court must address itself to after expunging from the records of this Court the Applicant/Petitioner's application for exemption from payment of security for costs. The Applicant/Petitioner filed his amended Petition for the Avoidance of Election Results on 17<sup>th</sup>

December 2010. While Mr. Kameya was clear that the applicant/petitioner's application for exemption from payment of security for costs collapsed because of the incurably defective affidavit, the learned Principal State Attorney expressed his opinion that for the interests of justice the applicant can still file a fresh application to request an exemption from payment of security for costs.

The learned Principal State Attorney cited Rule 32 (1) of the **National Elections (Election Petitions) Rules, 2010** which provides that no petition shall be dismissed on procedural irregularity unless the Court is of the opinion that such irregularity has resulted or is likely to result in a miscarriage of justice. The relevant Rule states,

"32.-(1) Save as is expressly provided for to the contrary in these Rules, no petition shall be dismissed for the reason only of non-compliance with any of the provisions of these Rules or for the reason only of any other procedural irregularity unless the court is of the opinion that such non-compliance or irregularity has resulted or is likely to result in a miscarriage of justice.

(2) Where there has been any non-compliance with any of the provisions of these Rules or any other procedural irregularity, the court may require the petitioner, subject to such terms as to costs or otherwise as the court may direct, to rectify the non-compliance or the irregularity in such manner as the court may order.

(3) Where an order has been made under sub-rule (2) of this rule, and the petitioner fails to comply with such order within such time as the court may specify, the court may dismiss the petition."

According to Mr. Kameya, the defective application for exemption from payment of security for costs does not imply that an election petition that has already been filed is automatically expunged from the records of this Court. The applicant/petitioner can still file a fresh application for exemption from payment of security for costs because as Rule 11-(1) of **National Elections (Election Petitions) Rules, 2010** read together with section 111 (2) of the **National Elections Act, Cap. 343** require that the issue of security for costs should be dealt with first before hearing of the petition is scheduled.

With due respect, Mr. Kameya has correctly restated the law on the fate of filed election petition where an application for exemption from payment of security for costs is expunged from the records. In my opinion, after a petition has been filed and the requisite filing fee of Tshs. 200,000/= has been paid the petition remains filed in the records of this Court till when the Registrar of High Court receives the security for costs ordered by the Judge in terms of section 111 (2) of the **National Elections Act**. A petition shall only be dismissed at this preliminary stage if the applicant/petitioner fails to comply with such order on security for costs within such time as this Court may specify. This Court has not at this point in time specified the security of costs payable by the Petitioner. In other words, the Petitioner still has a chance to either pay the Tshs 5,000,000/= security for costs or file a fresh application to seek exemption or determination thereof.

In the upshot having found that affidavit of Applicant/Petitioner is incurably defective, the preliminary objection is sustained and the application seeking exemption from payment of security for costs is struck out. Applicant/petitioner shall pay the costs.



**I.H. Juma**  
**JUDGE**  
**15-02-2011**

Ruling is delivered in the presence of Mr. Pius Mboya (Principal State Attorney) representing the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, and Mr. Kibatata, Advocate for the Petitioner / Applicant.



**I.H. Juma**  
**JUDGE**  
**15-02-2011**